

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

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In the Matter of

Petition for Declaratory Ruling to Clarify WT  
Docket No. 08-165  
Provisions of Section 332(c)(7)(B) to Ensure  
Timely Siting Review and to Preempt under  
Section 253 State and Local Ordinances that  
Classify All Wireless Siting Proposals as  
Requiring a Variance

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COMMENTS OF THE VILLAGE OF ALDEN, NEW YORK

These Comments are filed by the Village of Alden, New York to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. Village of Alden, New York also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. Â§ 332(c)(7)(B) governs wireless tower sitings to the exclusion of Â§ 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction and modification of personal wireless service facilities by any State or local government or instrumentality thereof.

(l) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in Â§ 332 is specific to wireless service facilities, while Â§ 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Courtâ€™s ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local governmentâ€™s final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that Â§ 332 applies to wireless service facilities to the exclusion of Â§ 253.

The Commission should also deny CTIAâ€™s Petition with respect to the request that the Commission should supply meaning to the phrase â€œfailure to act.â€ The Commissionâ€™s authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. â€œFailure to actâ€ is not an ambiguous phrase.

The word â€œfailureâ€ means the â€œomission of an occurrence or performance;â€ the word â€œactâ€ means â€œto carry out or perform an activity.â€ Taken together, the phrase â€œfailure to actâ€ means to omit the performance of an activity. Contrary to CTIAâ€™s assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests “within a reasonable time period, taking into account the nature of the request.”

Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in the Village of Alden, New York.

## 1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively, without the need for public hearings, others are required by state and local law to follow certain processes and procedures.

State and local law in Alden, New York requires certain notice and public hearings to ensure that the rights of the applicant and the public are preserved. These requirements are found in the following state and local code provisions: Chapter 193 of the Code of the Village of Alden adopted by the Board of Trustees under Local Law No. 1, 1997, as amended. Specifically, in the Village of Alden, New York a developer is required to provide for various notices depending upon the type of property onto which the tower is to be placed.

If the property is owned by the municipality, once documentation is obtained, the Board of Trustees renders the final decision with regard to the placement of the tower within thirty (30) days of the submission of the application for the special permit. No appearance before the Planning Board or Zoning Board of Appeals is required if municipal property is being utilized.

The same thirty (30) day time limitation exists for the Village to

render a decision if property within an industrial zone is to be used, but a developer must then submit the site plan to the Planning Board, which shall then pass upon the application prior to the Board of Trustees rendering a decision. In the event commercial property is utilized, in addition to appearing before the Planning Board prior to the Board of Trustees, a decision is rendered within sixty (60) days of the submission of the application. Additional information is necessary in order to protect what limited commercial property exists within the Village limits.

If a residential zone is to be used, additional information is necessary in order to protect the surrounding property owners. Since we are a Village as opposed to a primarily rural area, housing density plays a part in any such decisions and a decision would be rendered within ninety (90) days after application.

## 2. NUMBER OF APPLICATIONS AND OUTCOMES

For the past five (5) years, we have had two (2) applications for approval of wireless telecommunications facilities. Of these, no (0) applications were for collocations on existing facilities, one (1) was for a new facility on an existing structure, and one (1) was for a new tower.

The average time between filing of an application and final decision has been less than six (6) months, inclusive of the time expended by the telecommunications company to provide the introductory information required under the Code prior to the filing of a formal application.

That time also included review time by the cellular tower company, as well as preparation and review of the lease agreement between the municipality and the telecommunications company. During that time, a notice of claim and several actions were commenced by local property owners against the Village for the site. Nevertheless, from the time the first agreement was sent to counsel until the time construction on the site began, less than eight (8) months had elapsed. Most of that time was taken up, not as a result of any delays on the part of the Village as a result of any Code requirements, but rather, the addressing of concerns by both the Village and the telecommunications company of the residents' concerns.

The only other request addressed by the Village of Alden was from a different telecommunications company which withdrew its request due to technical reasons because it found a more suitable site outside of the Village. The issue, therefore, dealt not with any zoning or governmental regulations, but rather, coverage and service issues on the part of the telecommunications company.

By comparison, in the Village of Alden, the average time between application and final action for other land use approvals such as construction of a multi-residential unit is twelve months. In the instance of a commercial property owner wishing to place gas pumps on its own property directly above the water supply system for the Village, the necessary approvals as a result of State laws and engineering concerns with regard to the protection of the water supply for the residents took nearly eighteen months. In all instances, public safety and health were primary concerns.

### 3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

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